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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

KWAME M. KILPATRICK, et al

Defendant.
_______________________________/

Hon. Nancy G. Edmunds
Case No. 10-20403

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DETROIT

MEMORANDUM OF LAW CONCERNING CONFLICT OF INTEREST

NOW COMES James C. Thomas, of counsel to O'Reilly Rancilio, P.C., on behalf of Defendant Kwame M. Kilpatrick and pursuant to this Honorable Court's direction of Friday, August 3, 2012, presents to this Honorable Court a Memorandum of Law as it pertains to the issue of a conflict of interest that has arisen in the instant matter.[1] In support thereof, Mr. Kilpatrick states as follows:

FACTUAL BACKGROUND

Counsel has represented Mr. Kilpatrick since the inception of his criminal issues in March 2008. Mr. Kilpatrick was indicted in the instant matter originally on June 23, 2010. Representation has ensued unfettered until last week when an unforeseen and uncontemplated complication arose as a result of Mr. Thomas' prior representation of a witness who has been endorsed by the Government to appear in the trial of the above-entitled matter that has begun on August 8, 2012. Mr. Thomas was affiliated with the

[1] Original appearance was James C. Thomas, P.C.,

firm of James C. Thomas, P.C., who became affiliated with Plunkett Cooney in 2007. While maintaining separate offices he continued his relationship with the Firm, along with Michael Naughton up until April 1, 2012 when they became affiliated with the Macomb County law firm of O'Reilly Rancilio, P.C. Again, Mr. Thomas' offices continued to be located separately from the Firm's main office in Sterling Heights, Michigan. While office space is available in Sterling Heights, it is rarely used. All of Mr. Thomas and Mr. Naughton's files reside in the Detroit office and have done so uninterrupted despite the of counsel affiliations with the above two firms. Mr. Thomas and Mr. Naughton's files are located solely on their own password-protected server which no members of O'Reilly Rancilio, P.C. have access to. Similarly, Mr. Thomas and Mr. Naughton's secretarial staff and calendars reside on their own password-protected server, of which no members of O'Reilly Rancilio, P.C. have access as well.

This Honorable Court has requested that actual or potential conflicts be outlined,[2] undersigned counsel have represented Kwame M. Kilpatrick in the following matters since 2008:

1. People v. Kwame M. Kilpatrick, Wayne County Circuit Court, 08-10777-01, Mr. Kilpatrick was also represented by Mr. Gerald Evelyn (co-counsel in the joint defense of the instant matter for co-defendant Bobby Ferguson);

[2] While it may not be of any import to this Court's consideration of Mr. Kilpatrick's claims, it is interesting to note that attorney Martin Crandall has represented numerous persons of interest to the investigation. This may be more relevant to the severance claims. Those witnesses, at least three of whom appeared before the Grand Jury, are Lucious Vasser, Myron Terrell, Walter Stampor, Bernard Parker, Barry Clay, Paul Bernard, Kathleen Leavey and the Detroit Pension Funds.

2. Detroit Free Press and Detroit News v. City of Detroit, Wayne County Circuit Court, Case No. 08-100214-CZ;
3. William Moffitt v. Kwame M. Kilpatrick, Wayne County Circuit Court, 08-121895; Kwame M. Kilpatrick v. Michael Stefani, Wayne County Circuit Court Case Number 09-026485;
4. In the Matter of Certain Detroit Area Pensions, SEC C-07676; a potential conflict is that this investigation involves Chauncey Mayfield, a potential witness in this matter;
5. In re: Matter of Committee to Elect Kwame M. Kilpatrick, Michigan Secretary of State, 11-02-CF;
6. Flagg, et al. v. The City of Detroit, et al, Eastern District of Michigan, 05-74253; this case is currently pending appeal (Case Number 11-2501) of Judge Rosen's grant of Mr. Kilpatrick's and the City of Detroit's Motions for Summary Judgment, appellate briefing has begun and is pending oral argument. In that case Police Chief Ella Bully-Cummings was successfully represented by attorneys Kenneth Lewis and Randal Brown of Plunkett Cooney, P.C. This was at a time when undersigned counsel was of counsel to Plunkett Cooney, P.C. Both Ms. Bully-Cummings and Christine Beatty were deposed, in addition to 39 others, in that matter by the undersigned. At one point Ms. Beatty, Ms. Bully-Cummings and Mr. Kilpatrick had been represented by Morganroth & Morganroth, P.C. They were required to obtain separate counsel. Ms. Bully-Cummings and Mr. Kilparick waived conflict and were able to proceed in this as well as the Freedom of

Information Act matter before Judge Colombo.;

7. Miscellaneous taxpayer suits that were either dismissed on Motion for Summary Disposition or referred to the City of Detroit Law Department. Mr. Kilpatrick was consulted regarding State Bar matters as well. Counsel did not represent Mr. Kilpatrick in any post-trial proceedings in Wayne County Circuit Court before Judge Groner for ill-fated probation, parole or appellate issues.;
8. Kwame M. Kilpatrick v. Skytel, et al, United States District Court for the Southern District of Mississippi, Case Number 3:10-CV-287 DPJ-FKP, counsel did not enter an appearance or represent Mr. Kilpatrick, however there has been consultation with his current counsel and has an interest therein.;
9. Macomb Interceptor Drain Drainage District v. Kwame Kilpatrick, et al, Case Number 2:11-cv-13101 was filed on July 18, 2011. The Plaintiff in that case is represented by O'Reilly Rancilio, P.C. The undersigned was never retained to represent Mr. Kilpatrick in what appeared to be the beginning of monumental litigation, but did so in order to preserve him from default and premised upon the understanding that counsel would be replaced momentarily. Counsel entered an appearance under James C. Thomas, P.C. No replacement having been made, counsel withdrew with consent of the client on February 16, 2012. (See attached Exhibit 1.) This withdrawal was prior to joining O'Reilly Rancilio P.C. as of counsel (April 1, 2012).
10. There were no substantive discussions with the client or depositions in that civil case prior to withdrawal. No witnesses had been interviewed, no legal research

performed, in essence the Answer to the Complaint was filed and nothing more. While, Mr. Kilpatrick was joined with co-defendants Mercado and Bobby Ferguson his other co-defendants in that civil matter are not aligned with his position, apparently consistent with their testimony as witnesses for the Government in the criminal case.

11. The undersigned counsel have had no substantive discussions relating to that case with any member of O'Reilly Rancilio, P.C. relating to the Macomb Drain case except to the extent that privileges would be preserved and that protections would be maintained to avoid any potential or inadvertent sharing of information on this subject. There is no financial connection whatsoever between this litigation and any interest of the undersigned.

12. We have not represented any other endorsed witnesses in this matter except for Mr. Gasper Fiore.[3] On July 20, 2005, Mr. Fiore retained James C. Thomas, P.C. concerning a federal investigation by the FBI.[4] At the time of the Fourth

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[3] Counsel is aware that two other former clients have been interviewed as it relates to Mr. Kilpatrick's federal criminal investigations. They are Robert Schumake and Dante Demiro. Mr. Schumake was represented in a civil lawsuit brought by Fifth Third Bank in Oakland County Circuit Court as well as litigation in Wayne County Circuit Court relating to the Detroit Pension Funds and a sale and leaseback arrangement (IGC). Mr. Schumake was referred to independent counsel once it was determined that he was a potential witness in Mr. Kilpatrick's case. Mr. Demiro was referred to the Federal Defender's office, once it was determined that he had contributed to the Kilpatrick Civic Fund. Neither Mr. Schumake nor Mr. Demiro will be called as witnesses in this case according to the Government.

[4] While it was represented in the sealed Preliminary Hearing Regarding Conflicts of Interest (8/7/12) (hereinafter "Hearing") that the predicate for representation was relating to a contribution to the Defendant's re-election campaign (Detroit News Article dated March 9, 2005, see attached Exhibit 2), a review of counsel's file discloses that the bulk of the initial contact was due to Special Agent David L. Hunt's investigation of Tire Express, an independent and unrelated federal investigation in the years 2005 and 2006 that counsel was retained. That

Superseding Indictment it was determined that Mr. Gasper Fiore was a potential witness. Of course, this was long after he was represented by James C. Thomas, P.C. The potential for conflict was obvious, however not having represented Mr. Fiore since 2007, no waiver was obtained from him of his Sixth Amendment privileges relating to any conversations that we might have had. Those privileges have remained intact.

13. It was agreed by the Government and counsel that while Mr. Fiore presented a conflict, that in the event Mr. Fiore was to testify, the conflict would be resolved by obtaining independent counsel for cross-examination of Mr. Fiore and that any information which may have been obtained within the attorney-client privilege would not be discussed with that independent attorney to preserve the confidences of Mr. Fiore. To the extent that there were privileged communications those communications have been and will continue to be protected until Mr. Fiore waives that right.

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investigation related to SMART bus contracts with entities owned or controlled by Gasper Fiore. It is believed that shortly after counsel's initial meeting, contact was made with the U.S. Attorney's office and/or the FBI relating to the $25,000 contribution to the re-election of Mr. Kilpatrick. In any event, it was considered to be a State matter and a non-issue since payments made to legally formed law political action committees are allowed to be up to ten times the amount an individual may donate ($3,400).

In March 2006, however, two Grand Jury document requests were made as a result of the Tire Express investigation by Assistant United States Attorney Mark Chutkow and FBI Special Agent David L. Hunt. Upon review of billing documents, this amounted for the bulk of representation of Mr. Fiore or his entities. The documents were provided to the Grand Jury as requested and apparently the inquiry did not result in any further action or prosecution. Counsel's representation of Mr. Fiore did not expand beyond the year 2007, according to his records. This timeframe predates any criminal case (either State or federal) that was brought against Mr. Kilpatrick.

The undersigned has represented Kwame Kilpatrick in a whole host of legal matters since March 2008. However, in an abundance of caution undersigned counsel suggested to Mr. Fiore and two other clients that they contact another attorney.

On March 10, 2010, Mr. Fiore requested counsel's representation in another unrelated matter. It was at that time that he was introduced to Robert Morgan, who has represented him since then. Upon information and belief, at that time Mr. Fiore had not been questioned by the FBI, nor had he been implicated in any way to the various Indictments of Mr. Kilpatrick at that time. A federal Indictment was handed down on June 23, 2010. (Docket No. 1) At that time, present counsel was appointed by this Honorable Court to represent Mr. Kilpatrick for purposes of continuity. In the original Indictment, none of the factual allegations involved the witness. The same is true as it relates to the First, (Docket No. 20) Second (Docket No. 67) and Third Superseding Indictments (Docket No. 72), as well.

In January 2011, counsel had been representing Mr. Kilpatrick for some time. At that time there was no indication that Gasper Fiore was going to be called as a witness for any reason. There was no discovery provided that implicated his being a witness and there were no charges filed implicating Mr. Fiore. Mr. Kilpatrick was provided a waiver and executed it at that time, stating that the Firm, James C. Thomas, P.C., represented Mr. Fiore and two other individuals who were then perceived to be represented on unrelated matters. (See attached Exhibit 3.) However, not being clairvoyant, counsel could not have been more incorrect!

A Fourth Superseding Indictment was filed on February 15, 2012 (See Docket No.

74). In this most recent iteration of the Fourth Superseding Indictment two separate counts contain allegations concerning Mr. Fiore and supposed dealings with Mr. Kilpatrick.[5] These were completely new allegations not previously seen before the Fourth Superseding Indictment. These allegations arose subsequent to counsel's withdrawal from representation of Mr. Fiore and after the execution of the waiver of conflict by Mr. Kilpatrick. There has not been a waiver signed by Mr. Kilpatrick or Mr. Fiore since the filing of the Fourth Superseding Indictment. Mr. Kilpatrick has now indicated both orally and on the record that he does not wish to waive the conflict. He does not believe that appointment of an independent attorney serves his best interests. He has formalized his very strong wishes in an Affidavit (See attached Exhibit 4).

Having reviewed the Government's brief, counsel believes that, although arguably unintentional, the fashion in which the Government has proceeded has put Mr. Kilpatrick at a significant disadvantage. In hindsight, there are things that his attorneys could have done to anticipate the potential for what has become a conflict of interest, but it did not seem appropriate at the time. On April 3, 2012 the Government provided its first discovery concerning Mr. Fiore. This included an FBI 302 dated January 24, 2012 (See attached Exhibit 5). In that FBI 302 Mr. Fiore acknowledges, *inter alia*, an apparently unsolicited contribution to the Kilpatrick Campaign in 2004 in the amount of $25,000 through a Detroit law firm's political action committee. He indicated in that FBI 302 that he was "not pressured" to contribute. The defense relied on that representation to formulate a defense. While this was made a part of the Fourth Superseding Indictment on February 15, 2012 (See Docket No. 74, Fourth Superseding Indictment), it did not support the theory of bribery since the donation was perceived to be voluntary.[6]

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[5] See Docket Number 74, Count 1, Act III (RICO), Subsection J on paragraphs 308 through 312 on pages 63-64; and Count 12 (Bribery) on page 77.

On June 1, 2012, the Government provided a witness list to defense counsel that confirmed that Mr. Fiore would be testifying and that a representative from the political action committee were indeed going to be called as witnesses in this matter. Still, there was nothing forthcoming in discovery that confirmed coercive action on the part of Mr. Kilpatrick or his co-defendants and it was contemplated that any conflict could be resolved by Mr. Fiore's independent representation by Mr. Morgan and either cross-examination by co-counsel or an independent lawyer volunteering or appointed to cover the potential conflict.[7]

On August 2, 2012, in anticipation of the upcoming trial, Mr. Kilpatrick, for the first time, raised his concerns to counsel that a conflict of interest existed because of prior representation of Mr. Fiore. While the communication was by phone a week ago Thursday, Mr. Kilpatrick agreed to be more specific when we met the following Tuesday August 7, 2012 in Detroit.

Coincidently, it was not until August 3, 2012 that the Government provided counsel with Mr. Fiore's Grand Jury transcript, which was taken on February 15, 2012 (See attached Exhibit 6).[8] Importantly, this transcript differs from Mr. Fiore's FBI 302 in that an additional component is added, rather than voluntarily donating funds, Mr. Fiore's Grand Jury testimony now asserts that the funds were contributed based upon fear of economic harm. This situation suggests that an unresolvable conflict does exist between counsel in his representation of Mr. Kilpatrick.

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[6] Unless Mr. Fiore is willing to waive his attorney-client privilege a fuller explanation of counsel's conduct cannot be provided.

[7] As indicated above, the potential for conflict had previously been discussed with the Government and it was believed that the issue could be resolved by way of an independent attorney's cross-examination. Towards that end, the Federal Defender's office was contacted for an attorney to be appointed solely for the cross-examination of Mr. Fiore. This is a common procedure that has been employed in this district and it was believed that would satisfy any concerns by either the Government or the client. *See* United States v. Canty, 2006 WL 3469625 (Case No. 01-80571)

Counsel first became fully aware on August 7, 2012 from his client that such a remedy could not quell Mr. Kilpatrick's unshakable belief that a conflict of interest was present and that the conflict could not be fixed other than through disqualification of counsel. Again, counsel immediately contacted the United States Attorney's office and this Honorable Court to make them aware of the issue. Mr. Kilpatrick appeared before this Honorable Court on the afternoon of August 7, 2012 concerning his belief that a conflict of interest existed and advised the Court of the issue. Mr. Kilpatrick affirmed his belief to the Court that undersigned counsel's prior representation of the witness would render his assistance in the present matter ineffective. (Hearing at 21 – 24.)

Since that time it has become increasingly clear that the relationship has deteriorated to the extent that Mr. Kilpatrick believes it would be impossible to go forward with his current court appointed lawyer. As a result it is mandated that the Court conduct a hearing that has now been scheduled for Tuesday, August 14, 2012. This

[8] The issue of timely providing discovery is one in which there has been continuing discussion. The unmovable trial date has operated to the disadvantage of Mr. Kilpatrick who, even as late as August 3, 2012, continues to get additional discovery materials. The Government has not helped by being as complete as either the Defendant or undersigned would wish.

Honorable Court directed counsel and the Government to submit briefs concerning this matter by mid-day Monday, August 13, 2012. There are legal and ethical issues that mandate this Honorable Court's close scrutiny since it is believed that disqualification is now required based on the following, even in the case involving a lawyer who has been appointed.

LEGAL ANALYSIS

A. Sixth Amendment Right to Effective Assistance of Counsel.

The Sixth Amendment provides the right to effective assistance of counsel. "The Constitution guarantees a fair trial through the due process clause, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." Strickland v. Washington, 466 U.S. 668, 684–685 (1984). The Supreme Court recognized that the right at issue is the right to counsel of choice. United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). However in this case, counsel is appointed to represent Mr. Kilpatrick. His choice of attorneys is limited to the extent he relies on his right to court appointed lawyers. The Sixth Amendment protects the right to the assistance of counsel, even if counsel is appointed, in any trial for a serious crime. Gideon v. Wainwright, 372 U.S. 335 (1963). "The essential aim of the amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Wheat v. United States, 486 U.S. 153, 159 (1988), *see also* Morris v. Slappy, 461 U.S. 1, 13 – 14 (1983); Jones v. Barnes, 463 U.S. 745 (1983).

A trial court has an obligation to review and monitor conflicts as they arise.

United States v. Osborne, 402 F.3d 626 (6^{th} Cir. 2005); Cuyler v. Sullivan, 446 U.S. 335 (1980). The inquiry "focuses on the adversarial process, not on the accused's relationship with his lawyer as such." United States v. Cronic, 466 U.S. 648, 657 n. 21 (1984). Every defendant is entitled to "representation that is free from conflict of interest." United States v. Malpiedi, 62 F.3d 465, 469 (2^{nd} Cir. 1995), *citing* Wood v. Georgia, 450 U.S. 261 (1991). A client may waive his right to conflict-free representation. Holloway v. Arkansas, 435 U.S. 475, 483 n. 5 (1978). The waiver, however, must be made knowingly, intelligently and voluntarily. Brady v. United States, 397 U.S. 742, 748 (1970). Although a Defendant may waive a potential conflict, if "the conflict is so severe that no rational defendant would waive it, the court must disqualify the attorney." United States v. Kliti, 156 F3d 150, 153 (2^{nd} Cir. 1998). Where a court finds the existence of an actual conflict of interest it may decline the proffer of a waiver by the defendant. Wheat v. United States, 486 U.S. 153 (1988).

> The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, *much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants*. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them. (Emphasis added)

Wheat, 486 U.S. at 162-63. While Wheat concerns itself with issues relating to the client, the Court must be equally concerned with the privileges of Mr. Fiore. "[D]isqualificaiton motions should be granted where the attorney in question is potentially in a position to use privileged information obtained during prior representation of the movant." United States v. Ostrer, 597 F.2d 337, 339-340 (2nd Cir. 1979), *citing* Board of Education v. Nyquist, 590 F.2d 1241, 1246 (2nd Cir. 1979).

It is apparent at this time that Mr. Kilpatrick and counsel are no longer able to effectively communicate and lack meaningful dialogue. Although counsel has been objective and frank at all times in his communication with his client, it is clear that Mr. Kilpatrick has some very deep feelings on this subject.

B. Conflict and the Model Rules of Professional Conduct

ABA Model Rules of Professional Conduct, Rule 1.16 governs the termination of representation of counsel. Specifically, that rule states:

> a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
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> (1) the representation will result in violation of the rules of professional conduct or other law;
>
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
>
> (3) the lawyer is discharged.

Rule 1.7 of the ABA Model Rules of Professional Conduct states as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
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> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
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> (4) each affected client gives informed consent, confirmed in writing.

Rule 1.7 envisions a scenario of representation of two clients whose interests are adverse. This rule requires the attorney to consult both clients and obtain both of their consent. This rule anticipates possible conflicts that may exist in a joint representation scenario. Since Mr. Thomas represented Mr. Kilpatrick long after his representation of Mr. Fiore had concluded in 2007, this appears to be a successive representation issue as reflected below.

Rule 1.9 of the ABA Model Rules of Professional Conduct pertains to a conflict of interest with a former client, or otherwise known as a situation that involves successive representation. This rule states:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
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> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
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> (1) whose interests are materially adverse to that person; and
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> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
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> unless the former client gives informed consent, confirmed in writing.
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> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
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> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Successive representation occurs when an attorney previously represented a co-defendant or trial witness. Moss v. United States, 323 F.3d 445 (6th Cir. 2003). In successive representation cases, "mere proof that a criminal defendant's counsel previously represented a witness is insufficient to establish" an actual conflict. Enoch v. Gramley, 70 F.3d 1490 (7th Cir. 1995). The Court must analyze if an actual conflict exists by determining if "(1) counsel's earlier representation of the witness was substantially and particularly related to counsel's later representation of defendant; or (2) counsel actually learned particular confidential information during the prior representation of the witness that was relevant to defendant's later case." United States v. Canty, 2006 WL 3469625 E.D. Mich., 2006 *citing* Moss, 323 F.3d at 461-62.

The fear in successive representation cases is that the lawyer will fail to cross-examine the former client rigorously for fear of revealing or misusing privileged information. *See* Duncan, 256 F.3d 189, 198 (3rd. Cir. 2001); Enoch v. Gramley, 70 F.3d 1490, 1496 (7th Cir. 1995); Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir. 1988). Thus, the most common example of an actual conflict of interest arising from successive representation occurs where an attorney's former client serves as a government witness against the attorney's current client at trial. *See, e.g.,* United States v. McCutcheon, 86 F.3d 187, 189 (11th Cir.1996); United States v. Flynn, 87 F.3d 996 (8th Cir.1996); Enoch, *supra* ; United States v. Malpiedi, 62 F.3d 465 (2d Cir.1995); Takacs v. Engle, 768 F.2d 122, 125 (6th Cir.1985). *See also* Church v. Sullivan, 942 F.2d 1501, 1511 (10th Cir. 1991) ("[I]n the context of successive representations, we find it difficult to envision circumstances more fraught with inherent conflict than ... where the former representation was factually intertwined with the criminal defendant's case.")

Without betraying a confidence and based upon the recently received Grand Jury testimony, Model Rule 1.9 is clearly in play. The rule set forth in 1.9 protects the former client's interests, not necessarily the current client's. This rule requires consent from the *former client* if the attorney is to engage in representation of another person in a substantially related matter. That consent has not been received from Mr. Fiore. The attorney has an affirmative duty under this rule to not use information gathered from his representation of the former client in representing the defendant in the new matter. While it was counsel's prior reasonable belief[9] that his representation would not be adversely affected, it is now clear that after a review of Mr. Fiore's Grand Jury transcripts and events which have followed, counsel's initial beliefs are no longer well founded.

In United States v. Canty, *supra*, the Eastern District of Michigan permitted an attorney to represent an accused although that attorney had previously represented a witness. The Court relied upon representations by the Defense attorney that a conflict did not exist. Further, the Court held that any potential conflict was waived by the defense attorney's position that he would not cross-examine the witness and the defendant's knowing and intelligent waiver on the record. That is not going to happen here based on what we have seen thus far.

C. Actual Conflict

In certain Sixth Amendment contexts, prejudice is presumed. A "similar, though more limited presumption of prejudice" exists in a case involving an "actual conflict of interest that adversely affects counsel's performance." Cuyler v. Sullivan, 446 U.S. 335, 348-49 (1980). Prejudice is presumed when counsel is burdened by an actual conflict of interest. The presumption of prejudice arises when a client demonstrates that his or her attorney actively represented conflicting interests. Moss v. United States, 323 F.3d 445 (6th Cir. 2003). In those circumstances, counsel faces the possibility of breaching the duty of loyalty, perhaps the most basic of counsel's duties. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, *supra*. Counsel submits without disclosing the privileged communication that in light of the disclosure of the Grand Jury transcript of Mr. Fiore received on August 3, 2012, a conflict clearly exists.

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[9] It is acknowledged that the Fourth Superseding Indictment alleges a crime, however, upon review of the Ferguson transcripts that had been provided to date, it is clear that witnesses at trial testified quite differently in spirit and substance. Counsel, having practiced for a long time in this Court believes that is the rule rather than the exception, where witnesses are subjected to the rigors of cross-examination rather than a subjective interview of an agent.

Mr. Kilpatrick objected to the conflict on August 7, 2012. He does not wish independent counsel to cross-examine Mr. Fiore. The Government's proposal to dismiss the predicate acts and counts relating to Mr. Fiore in exchange for a waiver of the issue of conflict has been rejected. Mr. Kilpatrick does not wish to waive any issues that are now presented and wishes to go forward with a new lawyer. (*See* Hearing at page 23-24). The Court inquired that in the event of a conflict with Mr. Fiore were to be resolved, "are you telling me for other reasons that you do not want to go forward with Mr. Thomas?" He indicated that he did not.

When a defendant objects to a conflict prior to or during trial the trial court must inquire as to the extent of the conflict of interest. Failure to do so may subject a subsequent conviction to reversal. Moss v. United States, *supra*, *citing* Holloway, 435 U.S. at 489-492.

In this instance, contrary to the initial representations of the Government, Mr.

Fiore has refused to waive the confidentiality of his private communications with the undersigned as it relates to his alleged campaign contribution to the Kilpatrick Re-Election Fund in 2004, in the amount of $25,000. Consequently, those facts cannot be shared either with Mr. Kilpatrick or the Government. To the extent that they cannot be shared with Mr. Kilpatrick, and while he has professed his affection and appreciation on the record for counsel and their efforts, in the time since then, it has clearly deteriorated and unequivocally undermined the relationship to the extent that he is now requesting counsel's removal on other grounds. Counsel confirms that communication has broken down and does not have any reasonable expectation that it can be reinstated despite earnest attempts to do so.

ANALYSIS

A. Actual Conflict and the Government's Proposed Remedy

Based on a review of Counsel's file, it appears that the instant matter falls within the definition of successive representation. Counsel provided advice to Mr. Fiore in 2005 about an issue that arose in the most recent iteration of the Indictment. Subsequent to his representation of Mr. Fiore, counsel was appointed to represent Mr. Kilpatrick in the instant matter. Without piercing the attorney-client privilege too deeply, counsel provided advice to Mr. Fiore concerning an allegation now pleaded in the Fourth Superseding Indictment.

In order to disqualify counsel, Mr. Kilpatrick must make a showing to this Honorable Court that an actual conflict of interest exists. In counsel's estimation it now does.

Counsel's representation of Mr. Fiore dealt with an issue now substantially related to Mr. Kilpatrick's case, namely the allegation that a payment of money under the alleged fear of economic duress was made by Mr. Fiore to Mr. Kilpatrick's campaign in 2004.

In an effort to cure the potential conflict, counsel indicated that he would remove himself from cross-examining Mr. Fiore. This initial resolution was proposed to the Government and this Honorable Court. It was counsel's hope that this would remedy the conflict. However, Mr. Kilpatrick is adamant that this will not cure the conflict and refused to present a waiver to permit independent counsel to cross-examine Mr. Fiore. The Government, in its brief, has offered to remedy the situation by agreeing to dismiss the paragraphs and count relating to Mr. Fiore *after the jury is seated.* In effect, Mr. Kilpatrick will have counsel with whom he believes a conflict of interest exists through the process of selecting a jury. This should not be allowed to happen without a full hearing under the present circumstances. This offer has been detailed to Mr. Kilpatrick and he has refused it.

There are disciplinary rules in play that should be reviewed that require withdrawal. Counsel is attaching Exhibit 7, a series of ethics opinions from the State of Michigan that are instructive. RI – 111 provides for mandatory withdrawal when a lawyer representing multiple clients has learned one or more of the clients may have engaged in the challenged activity; RI – 108, where a lawyer's representation of two distinct clients in unrelated matters becomes consolidated with positions diametrically opposed, the lawyer is withdrawn when one client's interest would be hostile to the other client; RI – 137, relates to commercial litigation where a party's law firm previously represented an adverse party; RI – 207, outlines the requirements that a lawyer may not disclose a former client's confidences save few exceptions; RI – 237, outlines disciplinary rules as it relates to of counsel relationships.

The Government in its brief cites two cases for the proposition that the conflict can be removed; namely United States v. Perry, 94 Fed. Appx. (481 9th Cir 2004) and United States v. Taylor, 2012 WL 2819270 (S.D. Ohio, 2012). The Government, however, ignores three issues: timing, Mr. Fiore's refusal to waiver, and it is attempting to control Mr. Kilpatrick's choice as to how it is he is going to defend his case.

First, the Government in its proposal requires Mr. Kilpatrick to proceed with an attorney that he now asserts is conflicted throughout the jury selection process based upon the conditional promise that it will dismiss a count once the jury is seated. Clearly, this places Mr. Kilpatrick in a very difficult position as he will be relying on counsel in the jury selection phase that he contends has divided loyalties. This obviously poses a problem to the extent that the Government has the appearance of controlling Mr. Kilpatrick's choice of counsel.

Second, the Government provides no guidance on the issue of waiver between counsel and his former client.[10] The Government, in its brief, relies on United States v. Taylor, *supra*, for the proposition that the conflict is removed if the former client is not called as a witness. However, the Government overlooks the fact that the former client in Taylor waived his privilege and agreed to speak with appointed counsel and the Government; and allowed the conflicted attorney to "disclose to anyone anything that Smith had told him ... [and] could ask about anything that Smith had told him in confidence if Gounaris were to cross-examine Smith." Id. at page 6. Mr. Fiore has made it clear through his counsel that he does not intend to waive his attorney-client privilege. Under Rule 1.9, Mr. Fiore continues to have the expectation that his communications with counsel are privileged. Mr. Kilpatrick, for his part, has made clear to the Court that he anticipates Mr. Fiore, dismissed or not, to be a critical component to his defense and wishes to call him as a witness. Without a waiver from Mr. Fiore, Mr. Kilpatrick does not have the confidence that counsel is operating without conflict. Further, Mr. Kilpatrick has made it abundantly clear to counsel that he will not waive counsel's conflict of interest and would not entertain independent counsel intervening on cross-examination of Mr. Fiore. (Hearing at

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[10] The Government's conditional offer does not obviate the conflict posed. Whether Mr. Fiore is a witness or not, and whether it is a correct assertion or not, this Court cannot prevent against Mr. Kilpatrick raising an allegation post-trial that the divided loyalties between clients were a basis for a reversal in the event there is a conviction. Chief Justice Rehnquist spoke very clearly about this issue. While the district court is given substantial discretion in matters such as this, it is clear that a later prospect of being "whip-sawed" can be avoided by conceding to the Defendant's reasonable request that counsel be substituted.

Last, as stated above, Mr. Kilpatrick intends to call Mr. Fiore as a witness, regardless of whether or not the Government drops the allegations related to him. The Government, in anticipating this, would point to evidentiary and Fifth Amendment roadblocks that may prohibit Mr. Kilpatrick from utilizing Mr. Fiore as a witness. Such evidentiary obstacles, however, do not factor into an analysis of a Sixth Amendment right to conflict-free counsel claim. Mr. Kilpatrick feels that the Government, in effect, is dictating whom Mr. Kilpatrick may or may not be able to call as a witness and would be able to capitalize on the conflict of interest.

Concerning the breakdown of the attorney-client communication, Mr. Kilpatrick feels that the conflict of interest inhibits his ability to communicate on issues and to formulate a defensive strategy with counsel as he goes forward. (Hearing at 25.) As he perceives Mr. Fiore to be an integral part of his overall trial strategy, he would only be able to communicate some aspects to counsel and others he would to an independent counsel. (Hearing at pages 3 and 8.) Such a protocol would encumber a global defense strategy and put him at a tactical disadvantage. The Government indicates that if Mr. Fiore is removed as a witness, then that eliminates the problem. Mr. Kilpatrick disagrees and suggests that the Government's conduct and investigation of the case will be an issue. To the extent that Mr. Fiore and others have contributed to his and other political campaigns, this undercuts the theory that Mr. Kilpatrick was acting improperly or in any way different before, during or after his election. For the Government and/or the Court to rule on this issue in limine, again places Mr. Kilpatrick at a disadvantage since he has very clearly stated that he does not wish to go forward with present counsel.

For their part, counsel has made every effort to remedy any perceived conflict of interest stemming from his representation of Mr. Fiore. Despite counsel's efforts, counsel is aware that Mr. Kilpatrick strongly feels that the conflict of interest is has irrevocably damaged his relationship with counsel. What is more, counsel is aware that Mr. Kilpatrick has taken a very strong position that counsel's attempts to mitigate this issue with the Government and the Court was done so at his expense. To protect his right to conflict-free counsel, Mr. Kilpatrick maintains that the most constitutionally sound method of doing so would be the disqualification of counsel.

CONCLUSION

WHEREFORE, it is regretfully requested that pursuant to Mr. Kilpatrick's wishes, a conflict of interest be found against his appointed counsel and that undersigned counsel should be hereinafter disqualified from representing him any further in the instant matter.

Respectfully submitted,

O'REILLY RANCILIO, P.C.

By:_______/s/________________
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Dated: August 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2012, I personally delivered the foregoing paper with the Court. A copy was electronically mailed to the Government and co-counsel.

/s/ Michael C. Naughton
Michael C. Naughton

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Hon. Nancy G. Edmunds
Case No. 10-20403

v.

KWAME M. KILPATRICK, et al

Defendant.

_______________________________/

INDEX OF EXHIBITS

Exhibit 1	Order of Withdrawal, Case Number 2:11-cv-13101
Exhibit 2	Detroit News Article Dated March 9, 2005
Exhibit 3	Waiver
Exhibit 4	Affidavit signed by Kwame M. Kilpatrick
Exhibit 5	FBI 302 dated January 25, 2012
Exhibit 6	Grand Jury Transcript of Gasper Fiore, dated February 15, 2012
Exhibit 7	Ethics Opinions from the State Bar of Michigan
Exhibit 8	United States v. Canty, 2006 WL 3469625 (Case No. 01-80571)

EXHIBIT 1

ORDER OF WITHDRAWAL, CASE NO. 2:11-cv-13101

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MACOMB INTERCEPTOR DRAIN DRAINAGE DISTRICT,

Plaintiff,

v. Case No. 11-13101

KWAME KILPATRICK, et al.,

Defendants.
_______________________________________/

ORDER GRANTING MOTION TO WITHDRAW BY COUNSEL FOR DEFENDANT KWAME KILPATRICK, INDIVIDUALLY TOLLING DEADLINES AS TO DEFENDANT KILPATRICK, AND DIRECTING COUNSEL TO SERVE DEFENDANT KILPATRICK WITH A COPY OF THIS ORDER

Before the court is attorneys James Thomas and Michael Naughton's motion to withdraw as counsel for Defendant Kwame Kilpatrick. In support of their motion, counsel submitted a "Consent to Withdrawal" signed by Defendant Kilpatrick. (Consent to Withdrawal, Feb. 17, 2012, Dkt. # 184-1.) On March 12, 2012, the court entered an order holding in abeyance for 30 days counsel's motion to withdraw in order to allow Defendant Kilpatrick sufficient time to secure substitute counsel. (3/12/2012 Order, Dkt. # 197.) Counsel, however, have informed the court in a supplemental filing that their withdrawal must be consummated on or before April 1, 2012, in order to avoid violating the Michigan Rules of Professional Conduct. Effective April 1, 2012, both Mr. Thomas and Mr. Naughton are joining the law firm of O'Reilly Rancilio, P.C., one of the firms retained by Plaintiff Macomb Interceptor Drain Drainage District in this matter. The court agrees with counsel's conclusion that, pursuant to Michigan Rule of Professional

Conduct 1.16(a)(1), their move to O'Reilly Rancilio creates a conflict of interest justifying their mandatory withdrawal as counsel without further delay. To mitigate any potential prejudice to Defendant Kilpatrick as a result of counsel's withdrawal, the court will individually toll all deadlines for the filing of pleadings until April 19, 2012. If Defendant Kilpatrick has not retained substitute counsel by April 19, 2012, he will be deemed to be proceeding pro se, and he will be responsible for the management of his defense. Accordingly,

IT IS ORDERED that attorneys James Thomas and Michael Naughton's motion to withdraw [Dkt. # 181] is GRANTED.

IT IS FURTHER ORDERED that all deadlines for the filing of pleadings are individually TOLLED as to Defendant Kilpatrick until **April 19, 2012**.

IT IS FURTHER ORDERED that, in the event Defendant Kilpatrick is unable to retain substitute counsel by April 19, 2012, he is DIRECTED to file with the court the following contact information: (1) personal mailing address; (2) telephone number; AND (3) email address.

Finally, IT IS ORDERED that Mr. Thomas and Mr. Naughton are DIRECTED to serve Defendant Kilpatrick with this order. Counsel is further DIRECTED to file proof of service with the court.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: March 28, 2012

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, March 28, 2012, by electronic and/or ordinary mail.

S/Lisa G. Wagner
Case Manager and Deputy Clerk
(313) 234-5522

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MACOMB INTERCEPTOR DRAIN DRAINAGE DISTRICT,

Plaintiff,

Case No. 2:11-cv-13101
HON. ROBERT H. CLELAND

KWAME M. KILPATRICK, et al,

Defendants.

______________________________/

CONSENT TO WITHDRAWAL OF COUNSEL

I, **KWAME M. KILPATRICK**, having received a copy of counsels' Motion to Withdraw as Counsel, and being fully advised in the premises, do hereby consent to the withdrawal of James C. Thomas and Michael C. Naughton, as my attorneys in the above-referenced matter.

Kwame M. Kilpatrick

DATED: 2/16/12

EXHIBIT 2

DETROIT NEWS ARTICLE
DATED MARCH 9, 2005

Detroit News

Estimated printed pages: 4

March 9, 2005
Section: Front
Edition: Two Dot
Page: 09A
Correction:A March 9 story that ran on Page 9A about Detroit Mayor Kwame Kilpatrick's fund-raising network should have said Warren Realtor Ralph Roberts allegedly discussed making campaign contributions to former Macomb County Prosecutor Carl Marlinga in tape-recorded conversations. The story wrongly suggested that the recordings contained discussions about exceeding individual donor limits. Roberts is charged with exceeding campaign donation limits to Marlinga. (March 23, 2005 A2)

PAC, mayor get $25,000 on same day

Chesterfield tow truck owner says his donation followed state election laws.
The Detroit News

David Josar and Judy Lin

A Chesterfield tow truck operator who drew criticism for his hold on city contracts made a $25,000 donation to a political action committee the same day the committee donated the same amount to Mayor Kwame Kilpatrick's re-election campaign.
On July 14, 2004, Gasper Fiore, owner of Boulevard and Trumbull Towing, gave $25,000 to the Allen Brothers political action committee, state records show. That day, the political committee donated $25,000 to the Kilpatrick campaign.

The transactions accounted for the only donation received and only expenditure made by the committee on July 14. It was also the largest single donation the committee made since its inception.

While neither of the transactions is illegal, they could violate campaign finance laws if Fiore asked that his donation would be passed along to the mayor's campaign, which both Fiore and the political committee deny.

Michigan law allows an individual to give up to $3,400 to a candidate for local office in one year. A political action committee, however, which is formed to support a broader cause, can give up to $34,000. There is no limit on how much an individual may give to a committee.

An individual cannot donate to a committee money they want funneled to a specific candidate, said Kelly Chesney, a spokeswoman for the Bureau of Elections.

In the past, the state has required candidates to return money received in exactly that manner, she said.

An investigation of a donation can only be made when a formal complaint has been made, Chesney said, and no formal complaint has been made regarding these donations.

Although a substantial donation, it was not the only time the Allen Brothers PAC donated to a campaign in close proximity to receiving a donation of the same size from Fiore.

On Feb. 18, Fiore made a $15,000 donation to the Allen Brothers committee. Two days later, the committee made a $15,000 donation to the Friends of Warren Evans. Evans was running for Wayne County sheriff.

The $25,000 and $15,000 contributions were the only ones Fiore had made to the committee in its history, according to state records.

Fiore, who started in business by converting an ice cream truck into a mobile lunch wagon, said the donations were legal. "They are a matter of public record. I stand behind them," Fiore wrote.

The Allen Brothers law firm had represented Fiore in several civil cases involving his businesses.

In a separate written response, the Allen Brothers political action committee, which was created in 2001, said it did nothing wrong.

"Allen PAC has proudly and publicly contributed to dozens of candidates and committees and sister organizations. Each of those expenditures has been fully disclosed in accordance with state law," the response said.

The committee has given to other candidates, including Jennifer Granholm and Butch Hollowell, who recently joined the firm, as well as several Detroit City Council and Wayne County Commission contenders.

Allen Brothers political action committee has had more than 35 different contributors since its inception. In the past two years, however, only Fiore, Allen family members and an employee of the law firm have made contributions, according to state records.

The committee had given other donations to Kilpatrick, as well. It donated $75 on Aug. 30, 2004, and $3,400 on July 28, 2003, according to state records.

Because political action committees can give 10 times the amount to a candidate that an individual can, people who want to curry favor with a person running for office often give to a committee knowing the money will reach their preferred candidate, said Rich Robinson, executive director of the Michigan Campaign Finance Network, a nonpartisan group that advocates for campaign finance reform.

Showing a direct relationship between a person donating to a political action committee and the candidate who receives donations from a political action committee is difficult because cash from all committee donors is co-mingled, he explained. "There's always plausible deniability," he said.

Sometimes, however, state or federal regulators find there is enough evidence that someone deliberately used a political committee to circumvent the individual limit on campaign donations.

Last year, for example, Ralph Roberts, a Warren Realtor, was charged in a federal indictment with using a political committee to skirt campaign donation limits.

He is accused of giving more than his allowed limit to former Macomb County Prosecutor Carl Marlinga, who was running for the U.S. Congress.

In that instance, there are tape-recorded conversations, allegedly between Marlinga and Roberts, where Roberts discusses giving donations through a committee so he could go over the individual donor limit.

At the time Fiore made his donation, city auditor Joe Harris was reviewing towing contracts. He found that after a number of contracts were transferred to new companies, every third call requesting police-authorized towing was directed to a company owned by either Fiore or his wife, Joan.

He recommended the city reconsider the way the contracts are awarded.

The Allen Brothers committee asserts their donation to the Kilpatrick was not made to influence Harris' work.

"To suggest that the PAC's contributions could have affected the outcome of the Auditor General's work or result in special treatment is just plain wrong," their statement said.

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EXHIBIT 3

WAIVER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Hon. Nancy G. Edmunds
Case No. 10-20403

v.

KWAME KILPATRICK,

Defendant.
_________________________________/

WAIVER OF CONFLICT

This document is being executed as a result of James C. Thomas, P.C., having been appointed to represent Kwame Kilpatrick in the above-referenced matter.

It is expressly understood that James C. Thomas, P.C., is a professional corporation and that James C. Thomas have represented Robert Shumake, Dante DeMiro and Gaspe Fiore (hereinafter referred to as "the above-named individuals"), in unrelated matters. Counsel is aware of the fact that the government may wish to speak to any one or all of the above-named individuals, neither Mr. Thomas nor his firm represent Mr. DeMiro or Mr. Fiore at this time. Affirmative steps are being taken to withdraw from Mr. Shumake's file upon his return to the United States.

Being aware of the potential for conflict, pursuant to MRPC, Rule 1.16, and in an abundance of caution, and understanding the nature of the relationship between Mr. Thomas and the above-named individuals; I do hereby waive any potential conflict in the event the above-named individuals are called as witnesses against me.

Kwame Kilpatrick

EXHIBIT 4

AFFIDAVIT OF KWAME M. KILPATRICK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Hon. Nancy G. Edmunds
Case No. 10-20403

v.

KWAME M. KILPATRICK, et al

Defendant.
______________________________/

AFFIDAVIT OF KWAME M. KILPATRICK

STATE OF MICHIGAN)
COUNTY OF WAYNE)

Deponent being first duly sworn, deposes and says as follows:

1. My name is Kwame Malik Kilpatrick. I am of sound mind and over the age of 21. I give this affidavit freely and voluntarily and without any duress.
2. I am submitting this affidavit independently of my counsel. In submitting this affidavit, I do not intend to waive any claim of privilege that I may have between myself and Mr. Thomas and any other attorney, except on the specific issue of the conflict of interest arising from Mr. Thomas' representation of Witness A and myself, and the destruction of the Attorney/Client relationship between Mr. Thomas and myself.
3. It is not currently clear what, if anything, my counsel is filing with the court on the issue of Conflict of Interest and his continued representation of me.

Since the discovery of a conflict of interest a couple of weeks ago, my relationship with my counsel has steadily deteriorated. It is now at the point that we are no longer communicating and there has been a total erosion of trust and confidence. I do not know whether my attorney is protecting my interests or his interests. My last conversation with my counsel literally ended in a shouting conversation.

4. Although I provide more details below, one of the questions that deeply concern me is why my attorney did not tell me that there was a possibility of a problem when we received the Fourth Superseding Indictment. He saw that his former client was named in a substantive count. It seems to me, although I am not a criminal defense attorney but a layperson, that circumstance should have, at a minimum, caused my attorney, and even possibly the government's attorney, *at that time* to at least consider the possibility that there would be a conflict. Why wasn't a question raised then, by either my counsel or the government? Wasn't Witness A always going to be needed to testify about those allegations?

5. That there is a conflict of interest has now been recognized by my attorney. He has told me that there is a conflict of interest; that he would not be able to cross-examine Witness A; and that the government is now even considering dropping that count from the case. As stated above, I am a layperson, but from my perspective, there is a conflict of interest and my attorney has confirmed that to me.

6. At the *in camera* Hearing, held by this Honorable Court on August 7th, I learned for the first time, that in approximately 2005, James C. Thomas, P.C. began representation of a person, who I call Witness A. I do not know what the scope of the representation of Witness A was or what various matters Mr. Thomas has handled for Witness A.

7. In March of 2008, James C. Thomas, P.C. was retained as my attorney in a State matter filed by the Wayne County Prosecutor. Since that time, Mr. Thomas and his firm have undertaken representation in multiple collateral matters relating to the State charges as well as federal civil and State administrative proceedings. It is my recollection, that in 2009, we were both aware of the Federal Criminal Investigation, and that Mr. Thomas was advising me during this time with these matters as well.

8. The Court appointed Mr. Thomas,, to represent me on the first federal Indictment on July 13, 2010. He has continued to represent me through successive iterations of that Indictment, culminating in the Fourth Superseding on February 15, 2012.

9. I only recently learned, during the August 7th *in camera* Hearing, that my Counsel apparently provided advice to Witness A regarding a federal investigation that bears upon allegations in my case. My Counsel has never disclosed to me any details of that representation. He has always preserved the confidentiality of the representation of Witness A.

10. I am informed that my Counsel continued to have an attorney-client

relationship with Witness A until sometime before January 2011 when he suggested he obtain other counsel. I have not been told the reasons that my Counsel suggested that Witness A obtain other counsel. I do know that my Counsel would have been actively representing me on the federal indictment for a number of months before this said suggestion of new counsel was made.

11. My recollection is that the first time I learned that Mr. Thomas represented Witness A was most likely some time during 2010, and before any Federal Indictment. At that time, we were discussing a Michigan Secretary of State inquiry into my campaign finances. During a conversation, Mr. Thomas talking about the merits of my position mentioned that he represented Witness A and his lawyer concerning a check that was given to my campaign account. There were no details about the representation, and certainly no conversation about how this would bear on any Federal Investigation, Indictment or Trial. There was also no mention about when this representation occurred or its duration.

12. I was presented a waiver and signed it on or about January 2011. At that time, while there was a disclosure of the representation of Witness A, it was represented to be in an unrelated matter. I certainly never knowingly, intentionally and willingly waived any conflict of interest as it relates to Mr. Thomas representation of me in a Federal Criminal Proceeding. Mr. Thomas has also acknowledged this as well. At no time did my Counsel

tell me that he represented Witness A, and his business interest, in response to a Federal Subpoena or any criminal investigations.

13. I was never given any information about Mr. Thomas' representation of Witness A in a matter that is directly related to the Fourth Superseding Indictment.

14. On June 1, 2012, the Government provided a witness list to defense counsel that confirmed that Witness A and a representative from the political action committee were indeed going to be called as witnesses in this matter.

15. While the Government has been investigating me since at least 2005, the Government recently conceded in the August 7th *in camera* hearing before this Honorable Court that Witness A only became relevant four months ago. I am just a layperson, but it seems to me that this statement about "Witness A being relevant for 4 months" is very curious to me. The Government obtained documents earlier than 4 months ago, added him to the 4th Superseding Indictment, and also made decisions regarding this count prior to the Indictment being announced. This process would seem to have taken longer than 4 months.

16. Upon information and belief, Mr. Thomas has information based on his representation of Witness A that he cannot give me due to his attorney client relationship with Witness A. Contrary to the representations of the Government in the *in camera* proceeding, Witness A's attorney has indicated that he will not waive the attorney-client privilege that he holds

with Mr. Thomas, according to Mr. Thomas.

17. In addition to the actual conflict of interest that I believe exists between my Counsel's representation of Witness A and myself, this situation has created a breakdown in communication and trust that prohibits me from having confidence in my Counsel.

18. First, it is now obvious that my Counsel represented Witness A and that there is a serious conflict of interest. That information was never made known to me. The description of the nature of the representation of Witness A that was given to me by my Counsel is not the same description of the representation that was described in the *in camera* proceeding. I was never told that the representation related to a federal investigation. I was never told that production of documents relating to me was involved. Based upon the description that I heard at the *in camera* hearing, it is my belief that my Counsel either misrepresented the nature of the representation or omitted disclosure of material aspects of the representation. In either case, I did not have the accurate and necessary information to evaluate any conflict of interest.

19. Secondly, I believe that my Counsel should have been more aware of this potential conflict. When Witness A was named in the Fourth Superseding Indictment, in light of what I have only recently learned, it is my belief that if my Counsel was acting with a duty of loyalty to me, he would have immediately had a conversation with me about the potential conflict. It is

my belief that he, as an attorney, had an obligation to keep me informed of issues that would impact my case, my representation, and the trial of this case. My Counsel never brought to my attention any concern when the Fourth Superseding Indictment was returned.

20. Thirdly, since I have become aware of this conflict of interest, I have been quite candid and frank of my objection to the use of an independent counsel to cross-examine Witness A. I notified my attorney that I wished to discuss my concerns with him in person. Unbeknownst to me, even after I had directly expressed my opposition, my Counsel negotiated with the Assistant United States Attorney the use of an independent counsel as a means to avoid the conflict. Again, it is my belief that the duty of loyalty owed to me by my Counsel requires, at a minimum that we have that in-person discussion prior to his entering into an agreement with the government.

21. It has become apparent to me that I can no longer communicate effectively with my attorney. It is also obvious to me that my attorney is now putting his interests before mine. We had conversations about this situation, reached decisions as to how we would proceed, and I made my position on issues clear. Then, in direct contradiction of the course of action that we had agreed upon, Mr. Thomas publicly stated on a news broadcast words to the effect that he was going to be on this case. Mr. Thomas' public statements were in direct contradiction of the course of action that we had agreed upon.

22. It is my belief that going forward, the confidentiality of the relationship with Witness A as well as the circumstances surrounding this issue will continue to undermine my ability to present my defense. I know that I will second-guess Mr. Thomas on his representation of me. . I no longer trust that any of his legal advice to me will be given for my benefit, or the benefit of my defense. As a result, I need for Mr. Thomas to be replaced pursuant to Rule 1.16(a)(3) of the American Bar Association's Rules of Professional Conduct.

23. At this point, I do not know whether this was a strategic tactic by the government to cause a dissolution of the relationship with my present counsel or a lack of loyalty by my Counsel. I do know that these circumstances have left me unable to communicate with my attorney. I no longer have the confidence that he is putting my interests first.

24. I respectfully request that the Court allow me the opportunity to obtain new counsel.

25. Further, affiant sayeth not.

JONATHAN CRAIG NOTARY PUBLIC STATE OF TEXAS EXPIRES 02-09-2016

Kwame M. Kilpatrick

Subscribed and sworn to before me this 9th day of August, 2012

EXHIBIT 7

ETHICS OPINIONS FROM STATE BAR OF MICHIGAN

RI-111

December 23, 1991

SYLLABUS

A lawyer representing multiple clients in a malpractice case concerning indiscriminate prescription of medications, who learns that one or more of the clients may have in fact engaged in the challenged activity, must withdraw from the representation of all clients.

A lawyer representing multiple clients in a malpractice case concerning indiscriminate prescription of medications, who learns from one client that one or more of the clients may have in fact engaged in the challenged activity in the past, may not disclose that information to the medical regulatory authority or to prosecutors without client consent.

References: MRPC 1.6, 1.7(a), 1.7(b), 3.3; CI-81; *Upjohn Co v United States*, 449 US 383, 101 S Ct 677, 66 L Ed 2d 584 (1981).

TEXT

A lawyer was retained by an insurance company in a malpractice case to represent doctors A and B and the professional corporation ["P.C."] which employs them. The doctors are allergists, and the malpractice case involves an indiscriminate prescription of medications including valium and barbiturates. Doctors A and B previously owned the corporation and employed C. As a part of an agreement to purchase the corporation, C agreed to retain A and B for a specific period of time; A was scheduled to retire within three months and B within fifteen months.

Doctor C is the sole shareholder of the P.C.; doctors A, B and C have each retained separate counsel for the matter. In the capacity of counsel for the P.C., the lawyer received a letter from C identifying approximately 24 patients C believes are being treated inappropriately by A and B. In one case, the patient apparently had an extended stay in a drug rehabilitation clinic, but after release and resumption of treatment by A and B the patient became cross-addicted to a number of medications. Even though C confronted A and B regarding their practice, C believes A and/or B are continuing to prescribe medications, but are not noting them in the charts and/or not keeping the required copies of the prescriptions in the patients' charts.

After receiving this communication the lawyer notified A, B and the P.C. of the conflict of interest. With the consent of the P.C. the lawyer met with Drs. A and B and the doctors' individual counsel to review the records of the 24 patients identified by C, to determine if the questionable conduct is continuing. The lawyer is satisfied that with regard to the majority of the files the conduct had ceased. With regard to several files the inquiry was not yet complete.

The lawyer asks whether the lawyer has a duty to report A and B to the appropriate state agency and/or prosecutor's office in order to protect the patients.

The lawyer represents A, B and the P.C. wholly owned by C. Prior to taking on the representation of multiple clients a lawyer must determine whether the interests of the clients are directly adverse to other clients the lawyer represents, MRPC 1.7(a), or whether the representation would be materially limited by the lawyer's duties to another, MRPC 1.7(b). In addition, "when representation of multiple clients in a single matter is undertaken, the consultation shall include an explanation of the implications of the common representation and the advantages and risks involved." [MRPC 1.7(b)(2); in accord CI-81] When the lawyer undertook the multiple representation, it appeared that the interests of all clients were similar, *i.e.*, all wished to be exonerated from liability for indiscriminate prescription of medications.

The letter from C created a conflict among the lawyer's clients. In handling the malpractice matter the lawyer could not properly represent the interests of the P.C. without raising the issue of the culpability of A and B. The P.C. would seek to deny liability based upon A's and B's actions beyond the scope of their authority. A and B are likely to deny misconduct. C may be called to testify on behalf of the P.C., against the interests of A and B. The interests of the lawyer's clients are thus "directly adverse" and the lawyer must consider under MRPC 1.7(a)(1) whether a disinterested lawyer could reasonably believe the representation will not be adversely affected. Since we believe a disinterested lawyer could not reasonably believe the representation would not be irreparably affected by the disclosure from C, the lawyer must withdraw from the malpractice case. Consent of the clients does not vitiate the conflict, and MRPC 1.7(a)(2) is not available.

A similar analysis is available under MRPC 1.7(b) which states:

> "(b) A lawyer shall not represent a client if the representation of that client may be *materially limited by the lawyer's responsibilities to another client* or to a third person, or by the lawyer's own interests, unless:
>
> > "(1) the lawyer reasonably believes the *representation will not be adversely affected*; and
> >
> > "(2) the *client consents after consultation.* When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." Emphasis added.

The lawyer must make a determination as to whether the continued representation of the P.C. would be materially limited by the lawyer's responsibilities to A and B. If the lawyer determines that the answer to that question is affirmative, then the lawyer shall not continue the representation unless a disinterested lawyer would reasonably believe that the representation of A and B will not be adversely affected by C's disclosure. As concluded above, a disinterested lawyer could not reasonably believe the representation would not be irreparably affected by the disclosure from C, the lawyer must withdraw from the malpractice case. Consent of the clients does not vitiate the conflict, and MRPC 1.7(b)(2) is not available.

The lawyer may not merely withdraw from representation of A and B and continue to represent the P.C.; the lawyer must withdraw from the representation of all parties.

May the lawyer, or is the lawyer required to, report A and B to the medical regulatory authority or to prosecuting authorities? If C's letter was a confidence or secret, the lawyer's disclosure of the information is restricted pursuant to MRPC 1.6, which states:

> "(a) 'Confidence' refers to information protected by the client-lawyer privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> "(b) Except when permitted under paragraph (c), a lawyer shall not knowingly:
>
> > "(1) reveal a confidence or secret of a client;
> >
> > "(2) use a confidence or secret of a client to the disadvantage of the client; or
> >
> > "(3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.
>
> "(c) A lawyer may reveal:
>
> > "(1) *confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them*;
> >
> > "(2) confidences or secrets when permitted or required by these rules, or when required by law or court order;
> >
> > "(3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;
> >
> > "(4) *the intention of a client to commit a crime and the information necessary to prevent the crime*; and
> >
> > "(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct." Emphasis added.

The comment to Rule 1.6 states in part:

> ". . .[T]he lawyer may learn that a client intends prospective conduct that is criminal. Inaction by the lawyer is not a violation of Rule 1.2(c), except in the limited circumstances where failure to act constitutes assisting the client. See comments to Rule 1.2(c). However, the lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime. If the prospective crime is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventative action. When the threatened injury is grave, such as homicide or serious bodily injury, a lawyer may have an obligation under tort or criminal law to take reasonable preventive measures. Whether the lawyer's concern is based on moral or legal considerations, the interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information relating to the client. As stated in paragraph (c)(4), *the lawyer has professional discretion to reveal information in order to prevent a client's criminal act*.
>
> ". . .
>
> "The lawyer's exercise of discretion requires consideration of such factors as magnitude, proximity, and likelihood of the contemplated wrong; the nature of the lawyer's relationship with the client and with those who might be injured by the client; the lawyer's own involvement in the transaction; and factors that may extenuate the conduct in question. *Where practical, the lawyer should seek to persuade the client to take suitable action.* In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to make a disclosure permitted by paragraph (c) does not violate this rule." Emphasis added.

The letter from C is clearly at least a "secret" under MRPC 1.6, since it is information gained in the professional relationship the disclosure of which would be embarrassing or would likely be detrimental to clients A and B. The letter is probably also a "confidence" since it is a communication from the P.C. client's sole shareholder, and communicated to the lawyer solely for the purpose of the representation of the P.C. See, *Upjohn Co v United States*, 449 US 383, 101 S Ct 677, 66 L Ed 2d 584 (1981).

Therefore, the lawyer *may not* disclose the information unless it falls within one of the discretionary exceptions in MRPC 1.6(c). Exceptions which could apply are MRPC 1.6(c)(1), consent of the client, MRPC 1.6(c)(3), to rectify the consequences of an illegal or fraudulent act in the furtherance of which the lawyer's services have been used, and MRPC 1.6(c)(4), the client's intent to commit a crime.

From the facts provided to this Committee there is no suggestion that the lawyer's services are being used to further illegal conduct; therefore MRPC 1.6(c)(3) does not apply. Unless conduct is continuing and violates criminal laws, MRPC 1.6 (c)(4) does not permit disclosure. MRPC 1.6(c)(1) permits disclosure if the client consents. One of the characteristics of multiple representation is that the confidences and secrets of one client may be shared with the other clients, as necessary for the representation. A and B are aware of C's charges, as evidenced by the meeting at which patient files were reviewed. A and B have personal counsel to advise them regarding C's charges. A client may waive the client-lawyer privilege with regard to privileged information provided by that client. If C consents on behalf of the P.C., the lawyer may disclose.

We note that MRPC 3.3 prohibits a lawyer from knowingly "failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." The lawyers for the parties may be required to make disclosures to the tribunal or otherwise correct statements in pleadings or evidence which are contrary to the information which the lawyer gained from C's letter and verified in the consultation session.

RI-108

December 3, 1991

SYLLABUS

Where a lawyer's representation of two distinct clients in unrelated matters results in a consolidation of cases on appeal before the Supreme Court, and where the clients' positions are diametrically opposed and the lawyer, in advocating the best interests of one client, must necessarily advance an argument which would be hostile to the interests of the other client, the lawyer must withdraw from both representations.

References: MRPC 1.7, 8.4(c).

TEXT

A lawyer represents two separate and distinct clients in unrelated domestic relations cases as a result of appeals taken from decisions of the lower courts (one case already has reached the Supreme Court and leave to appeal has been filed in the second case), it is anticipated that the Supreme Court will assume jurisdiction of the second case, and may consolidate the two cases.

Although the clients and their cases are unrelated, the lawyer is faced with the duty to advocate and argue truly diametrically opposed and adverse positions. No matter what the ultimate decision is that may be arrived at by the Court, one client will succeed and the other will fail. There is not any apparent scenario which would permit a decision in which each client might prevail.

The lawyer asks whether it is proper for the lawyer to continue representation of the clients.

MRPC 1.7 states:

> "(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> > "(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> >
> > "(2) each client consents after consultation.
>
> "(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> > "(1) the lawyer reasonably believes the representation will not be adversely affected; and
> >
> > "(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

Authors Hazard and Hodes explain in *The Law of Lawyering*, Prentice Hall, 1991:

> "The question is always whether the same lawyer may serve both clients loyally. At one end of the continuum of conflict situations are those where the lawyer may serve the respective clients without their individual consent because the transactions are quite distinct. At an intermediate point are situations where the lawyer may represent both clients only with the consent of each because the legal aspects of the transactions are substantially related and entail client interests that are adverse. At the other end of the continuum are situations where concurrent representation is impermissible even with client consent, because the conflict is so intense that concurrent representation would entail an impaired relationship with one or more of the clients, making it unreasonable even to ask for their consent." pp 232-233.

When the lawyer undertook the representations, the matters were distinct and fit within the first type of situation described by Hazard and Hodes; client consent was not necessary. In trial courts, where the outcome has no precedential value to subsequent cases, a lawyer is not prevented from advocating to a tribunal a position contrary to that of another client, as long as that advocacy is not frivolous and the matters are not consolidated in one hearing before one adjudicator, MRPC 3.1.

It is not necessary to determine the exact point in time at which the representation of the client became "directly adverse" triggering MRPC 1.7(a), or "materially adverse" triggering MRPC 1.7(b), or when that adversity should have been apparent to the lawyer. We need only note on the facts provided, *i.e.*, that the cases are both before the Supreme Court, and that effective advocacy on behalf of one client would contravene the position of the other. Under those circumstances a disinterested lawyer could not reasonably conclude that the representation of the client would not be adversely affected. Client consent, therefore, would not vitiate the conflict. Nor may the lawyer withdraw from one case without withdrawing from the other.

We are told that the Supreme Court will grant leave to appeal in the second case and then may consolidate the two cases. The dilemma presented offers an excellent argument to the Court in opposition of any act of consolidation of the matters. However, should consolidation occur, as assumed by the inquiry, MRPC 1.7 clearly precludes the lawyer from representation in a situation that calls for the lawyer to advance an argument in behalf of one client that would be directly adverse to the interest of the second client being represented in the same proceeding.

Hazard and Hodes discuss a similar situation, as follows:

> "Lawyer L represents a plaintiff in one case in a state court and a defendant in an unrelated civil case in the same court. By chance, an identical technical question arises in both cases as to whether removal to federal court is proper. L is thus forced into the position of arguing opposing side of the same legal questions to the same federal judge.
>
> "This case presents another example of a 'positional' conflict of interest. The conflict is not 'direct,' because the two parties are not opposing each other in litigation, and have no dealings with each other except for sharing the same lawyer. Even though L will make different arguments to the same judge, these facts present a strong case for allowing the multiple representation . . . .
>
> "In the present case, L can explain to both clients that powerful arguments exist on both sides, and that he can properly present the strongest case for each position, and then let the court decide. On that basis, the client-lawyer relationships may not be jeopardized. Without the fortuity of a single lawyer's involvement, all that either client could reasonably have expected was that the best argument be made. Consequently, the representation each will receive will not have suffered at all. Furthermore, since each client could expect that his position in the litigation would be opposed by counsel for the other side, neither client has been harmed.
>
> "If the cases do not turn on a 'pure' question of law, but involve factual distinctions, the situation might be different, for L might then have to characterize the legal question differently, and so treat his clients unequally. It would also be different if the two clients frequently had occasion to litigate this question, and had a long-term interest in the way in which it was decided." *The Law of Lawyering*, pp 226.1-227.

In addition to duties to the respective clients, the lawyer has duties to the administration of justice, MRPC 8.4(c). At a consolidated hearing how could the court adequately question the lawyer about the inconsistent positions he takes? Does the court avoid giving advantage to the lawyer's clients by requiring the lawyer to file briefs and argue points before reviewing the arguments of opposing counsel, regardless of who is actually appellant or appellee? Adequate representation of both clients in such a setting would be impossible to attain.

Continued representation in the event of consolidation under the facts presented is not ethically permissible, and the lawyer must withdraw from both representations. In so holding we are aware that the clients suffer greatly by having their successful and apparently sufficiently competent legal representation removed at the Supreme Court level. We see no way that result can be ethically avoided.

Similar considerations are also raised in multiple representation before the Court of Appeals, in light of the Supreme Court's adoption of the rule that the first decision of a panel of the Court of Appeals binds the entire court. Supreme Court

Administrative Order 1990-6, 436 Mich lxxxiv.

RI-137

June 5, 1992

SYLLABUS

A lawyer may not undertake commercial litigation against a party when the lawyer's firm previously represented the party's spouse in a divorce matter in which the respondent was ordered to make payments to the law firm's former client, and the party's ability to make those payments to the former client will be detrimentally affected by the success of the lawyer in the commercial litigation.

References: MRPC 1.9(a) and (c), 1.10(a); RI-46.

TEXT

The sole shareholder and director of a closely held corporation has asked a lawyer to represent both the shareholder and the corporation as plaintiffs in commercial litigation against several individuals and a corporation. One respondent in the prospective matter is the spouse of a former client of the lawyer's firm, and against whom the law firm obtained a divorce judgment for child support and spousal maintenance. The prospective litigation could, if successful, adversely impact upon the respondent's ability to fulfill the financial obligations owed to the firm's former client under the divorce judgment, and could be used in a petition to justify a decrease in the amount of support owed to the wife.

The lawyer states that the former and current disputes are factually unrelated and that the lawyer does not anticipate using any information obtained in the divorce proceeding for any purpose in the current proceeding. The lawyer asks whether the prospective representation may be ethically undertaken.

MRPC 1.9(a) and (c) state:

> "(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
>
> ". . .
>
> "(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > "(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
> >
> > "(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client."

If any member of the firm is disqualified under MRPC 1.9, all members of the firm would be so disqualified. MRPC 1.10(a).

MRPC 1.9 establishes that even after a lawyer-client relationship has terminated, a lawyer retains certain duties to a client. The first question presented is whether the commercial dispute involving the prospective clients is "the same or substantially related" to the earlier divorce proceeding under MRPC 1.9(a). Clearly, the two matters are not "the same." However, a more in depth analysis is required to determine whether the two matters are "substantially related."

It has been stated that where the subject matter of the representation is the same, the matters are substantially related. RI-46. The commercial dispute between the sole shareholder and director of a closely held corporation and the corporation itself as against several individuals and another corporation cannot be said to involve the subject matter (i.e., domestic relations) of the previous divorce between the husband and wife. In this regard, the matters are clearly not substantially related.

Also, where the factual or legal issues overlap, the matters are substantially related. RI-46. The inquirer states that the former and current disputes are factually unrelated. Based on this representation and the disputes involved (i.e., former domestic relations matter as opposed to prospective commercial litigation), the legal issues involved in the two matters would appear to be also legally unrelated. In this regard, also, these are not substantially related matters.

Where there is a likelihood that information obtained in the former representation will have relevance to the subsequent representation, the matters are substantially related. RI-46. The inquiry states that the lawyer does not anticipate using any of the information obtained in the divorce proceedings for any purpose in the current proceeding. Even if true, this statement is not sufficient under MRPC 1.9(c). MRPC 1.9(c) prohibits the revelation or *use* of information from the prior representation unless the former client consents. The law firm would not know the impact the commercial litigation had on the respondent spouse if the law firm did not have information from the divorce representation regarding the status of the respondent's assets.

The second question is whether the commercial litigation is "materially adverse" to the interests of the former divorce client under MRPC 1.9(a). Ifsuccess in the prospective commercial litigation will interfere with the divorce client's ability to collect or enforce the divorce judgment obtained by the law firm, the commercial matter is materially adverse to the interests of the divorce client.

Therefore the lawyer may not undertake the prospective commercial litigation against the respondent spouse of the former divorce client of the lawyer's firm.

RI-207

April 11, 1994

SYLLABUS

Absent an applicable exception under MRPC 1.6(c), a lawyer may not disclose a former client's address to a third person unless the former client consents.

References: MRPC 1.6, 1.9, 8.4(c); JI-32, RI-77, RI-160, RI-165.

TEXT

A lawyer representing the prevailing party in a matter has asked opposing counsel to reveal the current address of the opposing party, so counsel may serve the party with a Bill of Costs. The opposing counsel asks for ethical guidance in responding to the request for the former client's address.

MRPC 1.6 states:

"(a) 'Confidence' refers to information protected by the client-lawyer privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

"(b) Except when permitted under paragraph (c), a lawyer shall not knowingly:

"(1) reveal a confidence or secret of a client;

"(2) use a confidence or secret of a client to the disadvantage of the client; or

"(3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

"(c) A lawyer may reveal:

"(1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;

"(2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;

"(3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a clients illegal or fraudulent act in the furtherance of which the lawyers services have been used;

"(4) the intention of a client to commit a crime and the information necessary to prevent the crime; and

"(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyers employees or associates against an accusation of wrongful conduct.

"(d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee."

MRPC 1.9(c) states:

"(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

> "(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
>
> "(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client."

Historically, there was a "general rule" that the mere identity of a client or the mere existence of a lawyer-client relationship is not privileged. This general rule, however, has witnessed considerable erosion in recent years. It must be recognized that client confidences or secrets protected by MRPC 1.6 are not the same as the lawyer-client privilege. Privilege is a question of law which shall not be addressed here. As indicated in the Comment to MRPC 1.6:

> "The principle of confidentiality is given effect in two related bodies of law, the client-lawyer privilege . . . in the law of evidence and the rule of confidentiality established in professional ethics . . . . The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies to confidences and secrets as defined in the rule. A lawyer may not disclose such information except as authorized or required by the Rule of Professional Conduct or other law . . . ."

This issue is discussed in both JI-32 and RI-77. In JI-32 a judge was asked to produce information concerning the conduct of a client from the judge's former law practice. The Committee opined that a lawyer who is asked to produce information which may be covered by the client-lawyer privilege or which contains potential confidences and secrets within the definition of MRPC 1.6, must await a subpoena, exercise the lawyer-client privilege, and await the presiding judge's instruction on whether to release the requested information.

In RI-77, however, the Committee went further. There, a law firm had inquired as to the ethical considerations of the law firm's delivery of client lists to a bank, disclosing names, addresses and other client information. The Committee found that MRPC 1.6 prohibits even the disclosure of a client's identity if the disclosure would be "embarrassing" or would "be likely to be detrimental" to the client. Although names and addresses of clients when the information which appear in the public record are no longer confidences or secrets, and there may be circumstances of the representation where it is obvious the client does not expect confidentiality, client consent is necessary would be a prerequisite to disclosure unless one of the exceptions of MRPC 1.6(c) applies.

RI-160 is distinguishable from our present facts. There, the Committee dealt with a situation of *ongoing* representation where the client was a fugitive from justice. The Committee found that the lawyer could not ethically *continue* to provide representation to the client which might assist the client in any criminal or fraudulent act and could be compelled by court order to disclose information concerning the client's whereabouts. In the present case, the lawyer-client relationship has ended.

In RI-165 the Committee opined that a lawyer has no duty to inform the prosecutor's office of its failure to initiate criminal charges against the lawyer's client, even though the initiation of the charges was part of a negotiated plea agreement between the lawyer and the prosecuting attorney. The opinion specifically addressed the impact of MRPC 8.4(c), finding that the lawyer's failure to remind the prosecutor or the tribunal did not constitute conduct prejudicial to the administration of justice.

Client consent after full disclosure would appear to be particularly appropriate under the instant fact situation. Certainly, disclosure of the client's address could work to the disadvantage of the client by permitting the opposite party to make service of the taxed bill of costs. Although the lawyer has no affirmative duty to help "hide" the former client or assist a former client in avoiding process, the lawyer cannot affirmatively act to provide the requisite information without the client's consent. Under MRPC 1.9(c)(1), a lawyer is likewise prohibited from using the information to the disadvantage of a former client, except as MRPC 1.6 or 3.3 would permit or require, or "when the information has become generally known." Thus, the ethical considerations for conflicts are consistent with those for confidences.

RI-237

June 6, 1995

SYLLABUS

A law firm may undertake representation to document a sales transaction which has been independently negotiated between a seller and purchaser who are both current clients of the law firm, if the relationship with the clients will not be adversely affected and both clients consent after consultation.

If a lawyer "of counsel" to the law firm is an estate fiduciary representing the majority ownership interests of the seller in the particular transaction, the law firm may not undertake representation to document the sale, even if the "of counsel" subsequently withdraws as estate fiduciary.

If the law firm has previously represented the fiduciary in matters involving the estate which is interested in selling the assets, the law firm may not undertake representation to document the sale for the seller and purchaser.

References: MRPC 1.7, 1.10(a), 2.2; R-10; RI-90, RI-102, RI-139, RI-194; CI-472.

TEXT

A law firm has for several years represented two separate clients, each engaged in the construction business. One client is a corporation involved in commercial construction. The other client is a partnership involved in multi-family residential construction.

The partnership is composed of two corporations. The majority shareholder owner of each partnership corporation is now deceased, such that the controlling interest in the partnership now rests with the decedent's estate. The estate personal representative is a retired partner of the law firm, who remains with the law firm in an "of counsel" capacity; the law firm has appeared in probate court on behalf of the estate fiduciary.

The beneficiaries of the estate and the personal representative now desire to sell certain partnership assets to the corporation client. The economic terms of the transaction have been negotiated between the partnership and the corporation with the participation of personal representative in a fiduciary capacity but without participation of counsel. The parties now seek counsel to document the terms of the transaction.

The law firm asks whether it may represent the purchaser corporation in documenting the transaction under the following circumstances:

1. Separate counsel would be retained to represent the interests of the partnership, the two partnership corporations, and the estate beneficiaries.
2. The purchasing corporation would retain separate counsel to advise it on the issue of conflict waiver.
3. All parties to the transaction would consent to the law firm's representation of the purchasing corporation in the matter after consultation with separate counsel.
4. The terms of the transaction would be presented to the probate court for approval, and the consent of all estate beneficiaries.

MRPC 1.7 states:

> "(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> > "(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

"(2) each client consents after consultation.

"(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless:

"(1) the lawyer reasonably believes the representation will not be adversely affected; and

"(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

In this fact situation the inquiring law firm has three current clients: the selling partnership which the firm has represented on unrelated matters; the purchasing corporation which the firm has represented on unrelated matters; and the estate fiduciary whom the firm has represented in probate. In resolving conflict of interest questions involving multiple clients and multiple lawyers, it is useful to view the situation from the perspective of the "most tainted" lawyer in the firm. Under MRPC 1.10(a), conflicts arising under MRPC 1.7 are imputed to all members of the law firm. If the proposed representation could be undertaken by the "most tainted" lawyer in the firm, it could be undertaken by another lawyer in the firm.

If the fiduciary "of counsel" could not ethically undertake the documentation representation directly, neither can any other member of the law firm. RI-102, RI-194. The fiduciary is a member of the law firm, in an "of counsel" capacity. For an "of counsel" designation to be proper, "the relationship must be a close, regular, personal one, involving frequent contact, similar to that of a retired or semi-retired partner who remains available to the firm for consulting and advice." CI-472, RI-90.

As pointed out in R-10, an estate fiduciary has statutory duties to fulfill for the benefit of the estate and makes decisions to maximize and preserve the assets of the estate, and to resolve claims. As fiduciary of the majority shareholder of the partnership corporations, the "of counsel" has made decisions in the best interests of the estate, including decisions favoring the sale of the partnership assets which the decedent controlled. The estate fiduciary, we are told, "participated substantially" in the sale discussions. The fiduciary has therefore acted to ensure that the sale terms are to the advantage of the selling partnership.

Under MRPC 1.7(b), the fiduciary duties of the "of counsel" lawyer materially limit the "of counsel's" ability to undertake the representation to document the sale for the seller and purchaser. The seller and the purchaser are on opposite sides of the transaction. Having already represented the interests of the seller in determining the terms of the transaction, even though this "representation" was in a fiduciary capacity and not as counsel for the estate, the "of counsel" lawyer could not now switch sides and purport to impartially document the transaction for both parties. The conflict is not vitiated by the involvement of the probate court, since the estate fiduciary is responsible for recommending the matter to the court and is not impartial.

The test for satisfying MRPC 1.7(b)(1) is whether a lawyer could or could not reasonably believe that the circumstances would not adversely affect the relationship with the other client is often stated as whether "a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances . . . ." A disinterested lawyer could not reasonably believe the documentation representation would not be adversely affected by the "of counsel's" fiduciary duties, and thus MRPC 1.7(b)(1) would not be satisfied. Client consent would not vitiate that conflict.

Since the "of counsel" lawyer could not undertake representation of the purchasing corporation while simultaneously acting as fiduciary for the selling interests, neither may any other member of the firm represent the purchasing corporation. MRPC 1.10(a).

Even if the proposed representation is seen as merely documenting the arrangements already agreed upon, a direct conflict is presented under the terms of MRPC 1.7(a). We note that the law firm represented the estate fiduciary in probate matters. The proposed sale transaction involves assets of the very estate in which the law firm delivered representation to the fiduciary. The law firm would be representing one client, the purchasing corporation, in a transaction directly adverse to two other clients, the selling partnership and the estate fiduciary. Although the selling partnership and the estate fiduciary may be in agreement concerning the sale of assets to the purchasing corporation, the fact that both the selling partnership and the estate fiduciary are current clients of the law firm exacerbates the law firm's conflict in documenting the transaction impartially and independently for all parties.

.e standard under MRPC 1.7(a)(1) is distinctively different than that under MRPC 1.7(b)(1), in that a disinterested lawyer must reasonably believe the *relationship* would not be adversely affected. It would seem that all parties would be desirous of wrapping up the transaction which had been negotiated. Both the seller and the purchasing parties have developed confidence and trust in the law firm's services in unrelated matters. Participation of trusted counsel in preparing the paperwork for a completed transaction, without providing advice or counsel to either party may enhance, rather than hinder, the relationship between clients and counsel.

If this analysis is an accurate assessment of the relationship between the law firm and the current clients, then MRPC 2.2 would allow the law firm to document the transaction with the knowing consent of the clients under MRPC 1.7(a)(2). The law firm must disclose both the conflict and the possible ramifications resulting from a waiver of the conflict, so that the clients can both make informed decisions on the waiver issue.

Therefore, since the estate fiduciary is "of counsel" to the law firm, the law firm may not ethically undertake the documentation representation. Although the law firm might be able to undertake the documentation representation if the estate fiduciary were not "of counsel" to the firm, the participation of the firm member as fiduciary acting in the transaction prohibits the firm from documenting the transaction on behalf of all parties. Neither screening the "of counsel" lawyer from the documentation representation nor withdrawal of the "of counsel" as estate fiduciary would cure the conflict that has already arisen. RI-139. If no member of the law firm had been involved in this transaction on behalf of the seller, the law firm could have undertaken the documentation representation with the informed consent of the partnership and the purchasing corporation.

EXHIBIT 8

UNITED STATES V CANTY
2006 WL 3469625 (CASE NO. 01-80571)

2006 WL 3469625
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

UNITED STATES of America, Plaintiff,
v.
Raymond CANTY D-2, Defendant.

No. 01-80571. | Nov. 30, 2006.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART THE GOVERNMENT'S MOTION *FOR INQUIRY AS TO POSSIBLE CONFLICTS OF INTEREST*

JOHN CORBETT O'MEARA, District Judge.

***1** Before the court is the government's motion for inquiry as to possible conflicts of interest of attorney Richard Lustig, filed September 13, 2006. Defendant Canty submitted a response on October 16, 2006. The court heard oral argument on October 19, 2006, and took the matter under advisement. For the reasons set forth below, the court grants in part and denies in part the government's motion.

BACKGROUND FACTS

The government is again raising the issue of Richard Lustig's prior representation of Milton "Butch" Jones, which creates a potential conflict of interest in this case. Lustig, who now represents Raymond Canty, represented Jones with respect to a plea hearing and sentencing on drug charges in 1983. The court previously dealt with this issue at a hearing on April 5, 2005, and found that "the potential conflict is remedied by the severance of the Defendants for trial as well as Defendant Canty's voluntary, knowing, and intelligent waiver of any conflict in open court." *See* Order dated April 6, 2005 (docket no. 488).

The reason that the government is raising the conflict issue again is that Butch Jones will likely testify against Canty at trial. The government contends that an actual conflict exists because Lustig will be in the position of cross-examining his former client. The government also expresses some concern whether a waiver will sufficiently cure the conflict. *See Wheat v. United States,* 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.") (noting also that the court may decline a proffer of waiver).

Lustig responds that his representation of Jones was brief, not particularly substantive (involving only a plea and sentencing), and took place over 20 years ago. Lustig also contends that a conflict can be avoided by having his co-counsel, John Martin, cross-examine Butch Jones. Further, Lustig states that his client will again waive any conflict, which Mr. Canty did in open court at the hearing on October 19, 2006.

LAW AND ANALYSIS

This court has an ongoing obligation to monitor and address conflicts as they arise. *See United States v. Osborne,* 402 F.3d 626 (6th Cir.2005); *Cuyler v. Sullivan,* 446 U.S. 335, 345, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Generally, it "is more difficult for a defendant to show that counsel actively represented conflicting interests in cases of successive rather than simultaneous representation." *Moss v. United States,* 323 F.3d 445, 459 (6th Cir.2003). "Successive representation occurs where defense counsel previously represented a co-defendant or trial witness." *Id.* As the Sixth Circuit has noted,

> The fear in successive representation cases is that the lawyer will fail to cross-examine the former client rigorously for fear of revealing or misusing privileged information. Thus, the most common example of an actual conflict of interest arising from successive representation occurs where an attorney's former client serves as a government witness against the attorney's current client at trial.

***2** *Id.* at 460. In a case of successive representation, "mere proof that a criminal defendant's counsel previously represented a witness is insufficient to establish" an actual conflict. *Enoch v. Gramley*, 70 F.3d 1490, 1496 (7th Cir.1995). Rather, a defendant may demonstrate an actual conflict where (1) counsel's earlier representation of the witness was substantially and particularly related to counsel's later representation of defendant; or (2) counsel actually learned particular confidential information during the prior representation of the witness that was relevant to defendant's later case. *Id.* (citation omitted); *Moss*, 323 F.3d at 461-62.

At the hearing, Lustig stated that his representation of Butch Jones over 20 years ago was brief, not substantive, and was in a matter not substantially related to this one. Further, Lustig asserted that he was not privy to client confidences and that his memory of the matter was consistent with the very terse version of events presented in Jones's book, *Y.B.I. (Young Boys, Incorporated) The Autobiography of Butch Jones*. In other words, Lustig contends that he is not aware of facts or client confidences regarding the prior representation that have not already been publicly available.

Under these circumstances, the court is not persuaded that a conflict of interest exists here. *See Enoch*, 70 F.3d at 1497-98 (attorney's prior representation of trial witness against his client did not create conflict of interest). The court in *Enoch* noted that a conflict does not necessarily exist when a lawyer cross-examines a former client. *Id.* The court also found that the trial court's reliance on defense counsel's own assessment of the potential for conflict "is reasonable because the attorney is in the best position professionally and ethically to determine whether a conflict exists or if there is a risk of one arising." *Id.* at 1498.

To the extent a conflict does exist, however, the court finds that it is not "severe" and is remedied by (1) Mr. Lustig's representation that he will not cross-examine or be involved in the cross-examination of Mr. Jones; and (2) Mr. Canty's knowing, intelligent waiver of any such conflict in open court. *See United States v. Akinseye*, 802 F.2d 740 (4th Cir.1986) (waiver sufficient in case of joint representation at trial); *United States v. Levy*, 25 F.3d 146, 153 (2d Cir.1994) (court obligated to disqualify attorney only in situations were it discovers that the attorney suffers from a "severe" conflict "such that no rational defendant would knowingly and intelligently desire the conflicted lawyer's representation").

ORDER

Accordingly, IT IS HEREBY ORDERED that the government's September 13, 2006 motion [docket no. 572] is GRANTED IN PART to the extent the government requested that the court make an inquiry regarding Mr. Lustig's potential conflict, which it has done.

IT IS FURTHER ORDERED that the government's motion is DENIED IN PART to the extent the government sought Mr. Lustig's disqualification.

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